LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 27 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 317

JANET MARIE CUDDY, ADMINISTRATRIX OF THE ESTATE OF JAMES R. CUDDY, JR., DECEASED,
Petitioner,

v.

WESTERN MARYLAND RAILWAY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM C. PURNELL,
300 St. Paul Place,
Baltimore, Md. 21202,
Counsel for Respondent.

The Daily Record Co., Baltimore 3, Md.

INDEX

Table of Contents

	PAGE
Questions Presented	1
Counter-Statement of the Case	2
Reasons for Denying the Writ	4
1. The lower court correctly ruled in granting the motion n.o.v. that the evidence was insufficient to support the jury's verdict	4
(a) The Petitioner's decedent had deviated from his employee relationship and was not under the protection of the F.E.L.A. at the time of the shooting	6
(b) The evidence of knowledge of the supervisory officers of the Respondent of the carrying of firearms in violation of Rule 25(h) was insufficient for submission to the jury	10
2. This case not only does not involve any factual issues, but also presents no matters of general importance sufficient to justify this Court in granting the Petition filed herein	12
Conclusion	13

Table of Citations

Copeland v. St. L., San Francisco Ry. Co., 291 Fed. 2d 119 (10th Cir., 1961)	7
Davis v. Green, 260 U.S. 349, 67 L. Ed. 299	7
Harris v. Pennsylvania Railroad Co., 361 U.S. 15, 4 L. Ed. 2d 1, 80 S. Ct. 22	12
Herdman v. Pennsylvania Railroad Co., 352 U.S. 518, 77 S. Ct. 455, 1 L. Ed. 2d 508 (1957)	5

PAGE

Inman v. Baltimore & Ohio Railroad Co., 361 U.S. 138, 80 S. Ct. 242, 4 L. Ed. 2d 198 (1959) 5, 12

Shea v. New York, New Haven and Hartford Railroad Co., 316 Fed. 2d 838 (1st Cir., 1963) 4

Sheaf v. Minn., St. Paul and S.S.M. R. Co., 162 Fed. 2d 110 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 317

JANET MARIE CUDDY, ADMINISTRATRIX OF THE ESTATE OF JAMES R. CUDDY, JR., DECEASED,

Petitioner,

v.

WESTERN MARYLAND RAILWAY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Was the District Court correct in the judicial appraisal of the sufficiency of the evidence to support the jury's verdict in finding that the evidence was insufficient for such purpose?

2. Does not the decision below turn upon its own facts and, hence, is of insufficient importance to justify this Honorable Court in granting certiorari?

COUNTER-STATEMENT OF THE CASE

All of the facts relating to the altercation between James R. Cuddy, Jr., and James T. Haney and of the subsequent shooting two days later were introduced by the Petitioner. Petitioner called as witnesses James R. Cuddy, Sr., James T. Haney, Samuel J. McCleary and Orville H. Spoonire. No witnesses were called by the Respondent in reference to the altercation and shooting.

The Petitioner's decedent, James R. Cuddy, Jr., was 41 years of age at the time of his death; James T. Haney, 68 (47a). Cuddy, Jr., was 5 feet 10 inches in height and weighed about 175 or 180 pounds (32a). As compared with Haney, he was a younger and a more stout man (32a).

Prior to the shooting on Saturday an incident had occurred at the Callers' Office on the previous Thursday. Mr. Haney at about quarter of four on that day had completed his tour of duty and was standing at the desk door of the Callers' Office making out his time card when Mr. Cuddy, Jr., came in and shoved Mr. Haney aside, saying, "Let a man get here registered" (47a). Mr. Cuddy, Jr., also grabbed Mr. Haney's shirt front and shook him, an act of aggrandizement performed by him on at least three prior occasions (51a). When asked whether this was done in a playful manner as a joke, Mr. Haney stated he did not know what Mr. Cuddy, Jr., called it, it certainly was not a joke to him. Cuddy, Jr., would shake the breath almost out of him, sometimes tearing buttons off his shirt (50a and 51a).

To continue the Thursday afternoon incident, witnesses McCleary and Spoonire verified Mr. Haney's statement that Cuddy, Jr., did shove him away from the registry door window, did grab ahold of his shirt front and shake him, and that Mr. Haney called Cuddy, Jr., foul names and

jabbed a pencil in his cheek as Cuddy held him (31a). Mr. Haney also threatened to cut him with his knife (34a).

Mr. Cuddy, Jr., then attempted to call Samuel K. Bonebrake, the Road Foreman of Engines and his superior officer, to complain of the stabbing with the pencil and threats made to him by Mr. Haney. He tried by telephone on two occasions and after that Mr. Haney left (34a). Mr. Cuddy, Jr., then went to Mr. Bonebrake's office and was informed that he was in Cumberland and would not return until the following day (96a). Mr. Cuddy, Jr., did not see Mr. Bonebrake or report the Thursday altercation to any official of the railroad company. Mr. Bonebrake knew nothing about this until after the shooting had occurred.

On Saturday Mr. Haney, after signing off-duty at between 3:40 and 3:45 walked across on the path from the Callers' Office to Elizabeth Street to get into his automobile to drive home. He was carrying his lunch box at the time in his right hand (54a, 107a). What happened to it after the shooting Haney did not know. He was never able to find it. On the other hand, Mr. Cuddy, Jr., when first seen standing on Elizabeth Street near this pathway by his father did not have his carryall bag with him. In answer to a question by the Court Mr. Cuddy, Sr., said he did not see it. However, this carryall was returned to Cuddy, Jr.'s home either that day or shortly thereafter. It was customary to carry such a bag to work (20a).

The altercation was started by Mr. Cuddy, Jr. As Mr. Haney walked up Mr. Cuddy, Sr., stated his son asked Mr. Haney if he cared to repeat the names that he had called him previously. Mr. Haney said, "Yes," whereupon Mr. Cuddy, Jr., slapped Mr. Haney with his left hand, knocking his glasses to the ground (22a). Mr. Haney said that Mr. Cuddy, Jr., did not slap him but hit him twice with judo

on the side of the face and on the neck. His glasses were broken (49a). He further stated that Cuddy, Jr.'s first remark to him was that he was going to beat Haney's old head off (49a).

> "Q. You said that you had prior trouble with Mr. Cuddy on a number of occasions. Was it always Mr. Cuddy's fault, never yours? A. I never agitate trouble, and I was too old a man to grab a younger man, a man forty pounds more than I, to shake him" (52a).

REASONS FOR DENYING THE WRIT

1. The lower court correctly ruled in granting the motion n.o.v. that the evidence was insufficient to support the jury's verdict.

Petitioner invokes the stewardship of this Court in order to regain for herself and children the constitutionally protected right to a jury trial and verdict, citing applicable cases of this Court in support of her position. The Respondent herein takes the position that before such constitutional right can be invoked the trial court must make a judicial appraisal as to the sufficiency of evidence to either support a jury verdict or, as in this case, to grant an n.o.v. In *Shea v. New York, New Haven and Hartford Railroad Company*, 316 Fed. 2d 838 (U.S.C.A. 1st Circuit, 1963), the Court said at page 840:

> "While it is true that in applying this statutory standard, the Supreme Court has allowed juries a liberal latitude in deciding whether particular facts make out employer negligence, e.g., *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 77 S. Ct. 457, 1 L. Ed. 2d 511 (1957), nonetheless, other opinions of the Court clearly indicate that there must still be a judicial appraisal as to the sufficiency of evidence to support a jury verdict. See, e.g., *Inman v. Baltimore & Ohio R. Co.*, 361 U.S. 138, 80 S. Ct. 242, 4 L. Ed. 2d 198 (1959);

Herdman v. Pennsylvania R. Co., 352 U.S. 518, 77 S. Ct. 455, 1 L. Ed. 2d 508 (1957)."

Also, in *Inman v. Baltimore & Ohio Railroad Company*, 361 U.S. 138, 80 S. Ct. 242, 4 L. Ed. 2d 198 (1959), this Court said on page 140:

> "In *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 1 L. Ed. 2d 493, 77 S. Ct. 443 (1957), we laid down the rule that 'judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death.' Id. at 506, 507. In measuring Ohio's disposition of the case here by the Rogers yardstick, we must affirm. The Act does not make the employer an insurer. Here petitioner had been working at Bettes Corners for seven years, performing these same duties under like circumstances and, for some three years, on this identical midnight shift. No accidents had occurred during that long period. In light of this background, we believe that the evidence here was so thin that, on a judicial appraisal, the conclusion must be drawn that negligence on the part of the railroad could have played no part in petitioner's injury."

To the same effect is the case of *Herdman v. Pennsylvania Railroad Company*, 352 U.S. 518, 77 S. Ct. 455, 1 L. Ed. 2d 508 (1957).

It is the contention of the Respondent herein that the lower court correctly ruled:

(a) That the uncontradicted evidence introduced by the Petitioner in this case conclusively proved that Petitioner's decedent had deviated from his employee purpose in going to work and at the time of the shooting was not under the protection of the F.E.L.A.; and

(b) That there was no evidence in the case that the officials of the Respondent were aware that its employees were carrying firearms on freight trains contrary to Rule 25(h).

(a) *The Petitioner's decedent had deviated from his employee relationship and was not under the protection of the F. E. L. A. at the time of the shooting.*

The lower court in its Memorandum Opinion said (p. 119a):

> "Granted that Cuddy was on his way to work, he certainly was under no compulsion so far as his work was concerned to stop and await the arrival of Haney. The evidence is clear and undisputed that decedent had stopped on his way to work for the express purpose of talking to Haney. It is also clearly undisputed that in the altercation which followed the confrontation decedent was the aggressor. Cuddy's deviation was not for any reason related to his employment but for a purely personal one."

The Petitioner under subheading B, page 10 of the Petition, and in the Statement of Facts on page 4, undertakes to create the impression that James T. Haney was the aggressor and that an employee, in this case, James R. Cuddy, Jr., who pauses momentarily to talk to a fellow employee while on the direct route to his job was entitled to the coverage of the F.E.L.A. as a matter of law. Such is not the case. As the lower court said in the quotation above, Cuddy, Jr., was the aggressor. This is borne out in Respondent's Additional Statement of Facts wherein it is shown that Cuddy, Jr., was aged 42 and 40 pounds heavier than James T. Haney, who was 68 at the time. Mr. Haney, who was called by the Petitioner, testified that Mr. Cuddy was not only the aggressor in the altercation of the previous Thursday, but on several other occasions (51a). In answer to a

question whether he had had prior trouble with Mr. Cuddy, he said, "I never agitate trouble, and I was too old a man to grab a younger man, a man forty pounds more than I, to shake him" (52a).

On the day of the shooting James R. Cuddy, Sr., testifying for the Petitioner, stated that when Mr. Haney appeared his son asked him if he cared to repeat the names he had called him previously, and then struck him, knocking his glasses to the ground (22a). Mr. Haney, also produced as witness for the Petitioner, stated that Mr. Cuddy, Jr.'s, first remark to him was that he was going to beat his old head off (49a).

It is thus apparent that Petitioner's decedent in waiting for Mr. Haney before proceeding to his employment for the purpose of accosting him constituted a willful act wholly outside the scope of his employment, intended only to further his own interests and not those of his employer.

In the early case of *Davis v. Green*, 260 U.S. 349, 67 L. Ed. 299, where an employee shot and killed a fellow employee while on duty, Justice Holmes, writing the opinion for this Court, held that such assault constitutes a deviation sufficient to prevent recovery under the F.E.L.A. That case has never been overruled and has been followed in 1947 in the case of *Sheaf v. Minn., St. Paul and S.S.M. R. Co.*, 162 Fed. 2d 110, where one employee got down from an engine and without provocation assaulted another employee causing serious personal injuries, the court holding that the unprovoked attack upon the Plaintiff while they were both employed by the Defendant Railroad Company was in no way intended to further the business of the Company and was not within the scope of the employee's employment. See also the case of *Copeland v. St. L., San Francisco Ry. Co.*, 291 Fed. 2d 119 (CCA for the 10th Circuit, 1961), where the Plaintiff was in the process of hal-

ancing a tie on his shoulder when a fellow employee as a practical joke pushed upward on the back end of the tie causing Plaintiff to become unbalanced and to sustain injuries.

The decision of the 10th Circuit Court of Appeals is apt and fully covers the situation presented herein. In affirming the District Court the Circuit Court said on page 120:

> "It is a case submitted on undisputed evidence to the effect that the injury to the plaintiff was caused by a fellow servant *who was acting entirely upon his own impulse*, for his own amusement, *and for no purpose of or benefit to the defendant employer*". (Emphasis supplied.)

The Circuit Court further said on page 121:

> "The Courts have held that an employer is not liable under the F.E.L.A. for assaults by employees, which assaults are not committed *within the scope of the wrongdoer's employment in furtherance of the master's business*. (Emphasis supplied.) *Davis v. Green*, 260 U.S. 349, 43 S. Ct. 123, 67 L. Ed. 299; *Euresti v. Washington Terminal Co.*, 108 U.S. App. D.C. 81, 280 F. 2d 629; *Sheaf v. Minneapolis, St. P. & S. Sfe M. Ry. Co.*, 8 Cir., 162 F. 2d 110. . . . This rational has been applied generally in cases in which an employee was injured by the act of a fellow employee in sport or play, 35 Am. Jur., Master and Servant, Sec. 201 (1941). It has been applied in cases of this nature brought under F.E.L.A. which are collected in Annotations 33 A.L.R. 2d 1925, 1309 (1954). *Hoyt v. Thompson*, 7 Cir., 174 F. 2d 284, for example, involved injuries to an employee which were caused by two other employees who were wrestling or scuffling over a bar of soap. It was held that the employees, while so engaged, *were not acting in the furtherance of the railroad's business*. (Emphasis supplied.) Accord, *Blunk v. Atchinson, T. & S. F. Ry. Co.*, 97 Cal. App. 2d 229, 217 P. 2d 494; . . ."

The Court concluded on page 121:

> "It is urged that under the provisions of Section 1 of the F.E.L.A., the railroad is liable in all cases if either (1) the injury of the workman results 'in whole or in part from the negligence of the officers, agents or employees of such carrier' regardless of whether the fellow employee is acting within the scope of his employment, or (2) the instrumentality which inflicts the injury in use in the carrier's business, regardless of whether the fellow employee using it at the moment of injury is acting within the scope of his employment. While the trend of the Supreme Court decisions has been to require cases to be submitted to a jury on meager evidence, and these decisions in effect hold that if there is a scintilla of evidence of employer negligence a factual question is presented, there is no decision which holds that there can be recovery without some fault on the part of the railroad, or without proof of negligent acts of employees for which the railroad is responsible." . . .
>
> "We conclude, as did the trial court, that the acts of the fellow employee which caused plaintiff's injury *were wholly outside the scope of his employment, intended only to further his own interests, and not those of his employer, and were not chargeable to his employer.*" (Emphasis supplied.)

It is respectfully submitted that in the undisputed evidence in this case the trial court correctly ruled as a matter of law that at the time of the shooting Petitioner's decedent was not within the coverage of the F.E.L.A. On this point alone, the Petition for Certiorari in this case should be denied.

(b) *The evidence of knowledge of the supervisory officers of the Respondent of the carrying of firearms in violation of Rule 25(h) was insufficient for submission to the jury.*

The lower court in its decision on this point said (120a):

> "A careful reading of the testimony in this case leads to the inevitable conclusion that the plaintiff utterly failed to produce any evidence whatever of knowledge on the part of the defendant through its supervisory officers of the carrying of firearms by its employees on freight trains contrary to Rule 25(h). Under such circumstances there is no basis on which negligence could be imputed to this defendant in connection with Haney's possession of a concealed revolver on this occasion."

This is borne out by the evidence. Samuel Bonebrake, Road Foreman of Engines, called as witness by the Petitioner, stated that he had received no information that railroad employees carried guns on their persons while working for the railroad (57a). Ira B. Chambers, Eastern Superintendent for the Respondent, stated that Rule 25(h) was promulgated in 1953 after he had been informed of an incident in which an employee carried a gun while riding an engine on pusher service. Thereafter to the date of the shooting there had been no reports to him nor did he of his own knowledge know of any violations of this Rule (80a). His testimony also clearly indicated that before the railroad could take any disciplinary action for the violation of a Company Rule, an officer of the Company would either have to have personal knowledge of a violation or would have to be notified of the same. Then an investigation would be conducted, due notice thereof given the employee and union representative in order to obtain counsel and witnesses for a hearing. This entire procedure is governed by the union agreement (77a, 77b).

Petitioner for the first time in her Petition herein attempted to promote Orville Spoonire to a supervisory capacity. This employee knew that other employees carried guns on the job on different occasions during the hunting season and had actually seen them do so up until the time that Petitioner's decedent was shot (36a).

Mr. Spoonire was employed by the Respondent as a crew caller (34a). His job is to call the engine and train crews to go to work (38a). He is a supervisory employee only to the extent of looking after the office and conducting the calls to protect the seniority of the employees in their shifts in and out in connection with their employment (78a).

In answer to a specific question as to whether he at any time reported to any supervisory officers of the Company that employees of the Respondent were carrying guns during the hunting season, he said, "I didn't report it to anybody" (39a).

The Petitioner in her argument on this point on page 9 sets forth six steps that the Respondent could and should have taken to stamp out the dangerous practice of its employees carrying guns while on duty. It is submitted that in the absence of firsthand knowledge or of complaints having been presented to the supervisory officers of the Company of the practice of carrying guns, whether in violation of the Rule or otherwise, the Respondent could not be expected to conduct an investigation to determine whether this practice was followed. It could only take disciplinary action after its supervisory personnel had personal knowledge of a violation or had been notified of the same. As set forth above, the entire procedure is governed by the union agreement. In the absence of any actual knowledge or complaint, the Respondent was under no obligation to stab at windmills, so to speak. Petitioner attempted to create a smoke screen, but completely failed to introduce any evi-

dence of knowledge on the part of the Respondent of the carrying of firearms by employees while on duty. As Judge Follmer in his Memorandum Opinion in the District Court said:

> "There was no evidence that the company knew or had reason to know that firearms were on the company's trains in violation of the rule, and obviously the circumstances did not call for any drastic plan for frisking each employee as he entered upon his work."

In the light of this, the quotation from this Court's decision in the *Inman* case is apt (p. 140). "We believe that the evidence here was so thin that on a judicial appraisal the conclusion must be drawn that negligence on the part of the railroad could have played no part in Petitioner's" decedent's death.

2. This case not only does not involve any factual issues, but also presents no matters of general importance sufficient to justify this Court in granting the Petition filed herein.

The question of granting of Petitions for Certiorari in F.E.L.A. cases has been the subject of much study by this Court in recent years. A review of such cases for a ten year period to October 19, 1959, was made by Mr. Justice Douglas in a separate opinion in the case of *Harris v. Pennsylvania Railroad Company*, 361 U.S. 15, 4 L. Ed. 2d 1, 80 S. Ct. 22. Also, Mr. Justice Harlan, joined by Mr. Justice Whittaker, dissented in that case, in effect concurring with Mr. Justice Frankfurter on the ground that a case of this kind involving only factual issues and which are of no general importance have no legitimate demands upon the energies of the Court already taxed to the utmost. In the *Inman v. B&O* case, *supra*, Mr. Justice Frankfurter was of the opinion that the Petition for Writ of Certiorari should have been dismissed as improvidently granted.

In the case at bar there are in fact no factual issues, not only as to the deviation of Petitioner's decedent, but also as to proof of knowledge on the part of the supervisory officers of the Respondent that employees were carrying firearms while on locomotives contrary to Defendant's Rule 25(h) or while in the employ of the Respondent. To grant this Petition would in effect be in complete disregard of any judicial supervision over jury verdicts in such cases.

CONCLUSION

For the reasons set forth above the Respondent respectfully urges this Honorable Court to deny the Petition for Certiorari.

Respectfully submitted,

WILLIAM C. PURNELL,
Counsel for Respondent.